

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

TED SPICE,

Plaintiff,

v.

INTERNAL REVENUE SERVICE, et. al.,

Defendants.

CASE NO. 20-5005 RJB

ORDER ON MOTION TO DISMISS  
AND REGARDING REMAINING  
DEFENDANTS

This matter comes before the Court on the Defendant United States' Motion to Dismiss (Dkt. 56) and the Plaintiff's response to the Court's order as to whether he intended to proceed against certain named Defendants (Dkt. 79). The Court has considered the pleadings filed regarding the motion, the response, and the remaining record.

**A. MOTION TO DISMISS**

On January 6, 2020, the Plaintiff filed this case, naming the Internal Revenue Service ("IRS") as one of the Defendants. Dkt. 1. On May 19, 2020, the United States appeared and filed the instant motion to dismiss, noting that federal government's waiver of sovereign immunity does not include the IRS as a defendant – that the proper defendant is the United States. Dkt. 56. It further argues that the case should be dismissed against under Fed. R. Civ. P.

1 12(b)(1), for lack of subject matter jurisdiction, and under Fed. R. Civ. P. 12(b)(6), for failure to  
2 state a claim. Dkt. 56. The United States argues that the Court does not have subject matter  
3 jurisdiction because the Plaintiff cannot show it has waived its sovereign immunity here. *Id.*  
4 Additionally, it argues that the Complaint fails to make any substantive allegations against the  
5 United States, identify a claim against it, or ask for any relief related to it. *Id.*

6 A complaint must be dismissed under Fed. R. Civ. P. 12 (b)(1) if, considering the factual  
7 allegations in the light most favorable to the plaintiff, the action: (1) does not arise under the  
8 Constitution, laws, or treaties of the United States, or does not fall within one of the other  
9 enumerated categories of Article III, Section 2, of the Constitution; (2) is not a case or  
10 controversy within the meaning of the Constitution; or (3) is not one described by any  
11 jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *D.G. Rung Indus., Inc. v.*  
12 *Tinnerman*, 626 F.Supp. 1062, 1063 (W.D. Wash. 1986); *see* 28 U.S.C. §§ 1331 (federal  
13 question jurisdiction) and 1346 (United States as a defendant). When considering a motion to  
14 dismiss pursuant to Rule 12 (b)(1), the court is not restricted to the face of the pleadings, but may  
15 review any evidence to resolve factual disputes concerning the existence of jurisdiction.  
16 *McCarthy v. United States*, 850 F.2d 558, 560 (9<sup>th</sup> Cir. 1988), *cert. denied*, 489 U.S. 1052  
17 (1989); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9<sup>th</sup> Cir. 1983). A federal court  
18 is presumed to lack subject matter jurisdiction until plaintiff establishes otherwise. *Kokkonen v.*  
19 *Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994); *Stock West, Inc. v. Confederated*  
20 *Tribes*, 873 F.2d 1221, 1225 (9<sup>th</sup> Cir. 1989). Therefore, plaintiff bears the burden of proving the  
21 existence of subject matter jurisdiction. *Stock West*, 873 F.2d at 1225; *Thornhill Publishing Co.,*  
22 *Inc. v. Gen'l Tel & Elect. Corp.*, 594 F.2d 730, 733 (9<sup>th</sup> Cir. 1979).

1 The United States, as sovereign, is immune from suit unless it consents to be sued. *See*  
2 *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Cato v. United States*, 70 F.3d 1103, 1107  
3 (9th Cir. 1995). If a claim does not fall squarely within the strict terms of a waiver of sovereign  
4 immunity, a district court is without subject matter jurisdiction. *See, e.g., Mundy v. United States*,  
5 983 F.2d 950, 952 (9th Cir. 1993).

6 Fed. R. Civ. P. 12(b)(6) motions to dismiss may be based on either the lack of a  
7 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.  
8 *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations  
9 are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*,  
10 717 F.2d 1295 (9th Cir. 1983).

11 The United States' motion to dismiss (Dkt. 56) should be granted. The Plaintiff does not  
12 oppose it. Further, the motion has merit. The Plaintiff has failed to show that his claims (to the  
13 extent he makes any against the United States (sued as the IRS)) "fall squarely within the strict  
14 terms of a waiver of sovereign immunity." *See Mundy*, at 952. This Court is without subject  
15 matter jurisdiction. Further, the Plaintiff failed to allege sufficient facts against the United States  
16 to state a claim for relief. The case against the United States, sued in the name of the IRS,  
17 should be dismissed.

## 18 **B. REMAINING DEFENDANTS**

19 By order dated, June 9, 2020, the Court noted that Defendants Bank of America NA  
20 ("BOA"); Bank of New York Mellon, as Trustee on behalf of the registered holders of  
21 Alternative Loan Trust 2006-OA3, Mortgage Pass-through Certificates, Series 2006-OA3  
22 formerly known as Bank of New York ("Bank of NY"); GMAC Mortgage LLC ("GMAC"); and  
23  
24

1 Ditech Financial LLC (“Ditech”) have not appeared in this case. Dkt. 77. The Order further  
2 provided:

3 The record does not reflect whether these parties have been properly  
4 served.

5 This case was filed on January 6, 2020 – over six months ago. The  
6 Plaintiff has not moved for default against BOA, Bank of NY, GMAC or Ditech.  
Based on the allegations and claims in the Complaint, it is not clear whether he  
has stated a claim against any of these Defendants or seeks any relief against  
them.

7 Aside from these Defendants (BOA, Bank of NY, GMAC and Ditech) and  
8 the United States, all other Defendants in this case have been dismissed. The  
United States has a motion to dismiss noted for consideration for this Friday, June  
12, 2020.

9 During the six months that this case has been pending, the Plaintiff has  
10 taken no action on the record regarding BOA, Bank of NY, GMAC or Ditech. It  
is not clear whether he intends to continue the case against them. To clarify the  
record, on or before June 12, 2020, the Plaintiff should be ordered to inform the  
Court of whether he intends to continue the case against Defendants BOA, Bank  
of NY, GMAC or Ditech.

11  
12 Dkt. 77, at 2-3.

13 By letter, the Plaintiff responded to the Court’s order and stated that he did not intend to  
14 continue the case against these parties. Dkt. 79. He further states that he will be “filing to  
15 voluntarily dismiss this case.” *Id.* This pleading should be construed as a motion to voluntarily  
16 dismiss all his remaining claims this case.

17 The Defendants BOA, Bank of NY, GMAC or Ditech should be dismissed without  
18 prejudice. There are no other Defendants remaining in this case. It should be closed.

19 **ORDER**

20 Therefore, it is hereby **ORDERED** that:

- 21 • Defendant United States’ (named as the Internal Revenue Service) Motion to  
22 Dismiss (Dkt. 56) **IS GRANTED**;
- 23 • The United States (named as the Internal Revenue Service) **IS DISMISSED**; and  
24

- Defendants Bank of America NA; Bank of New York Mellon, as Trustee on behalf of the registered holders of Alternative Loan Trust 2006-OA3, Mortgage Pass-through Certificates, Series 2006-OA3 formerly known as Bank of New York; GMAC Mortgage LLC; and Ditech Financial LLC **ARE DISMISSED WITHOUT PREJUDICE**; and
- This case **IS CLOSED**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 15<sup>th</sup> day of June, 2020.

A handwritten signature in black ink, reading "Robert J. Bryan", written over a horizontal line.

ROBERT J. BRYAN  
United States District Judge